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2 IN THE CIRCUIT COURT OF THE 11TH JUDICIAL
3 CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

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5 NO. 94-08273 CA (20)
6 FBN: 614009

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8 HOWARD A. ENGLE, M.D.,) DEPOSITION UPON
9 et al)
10 Plaintiff,) ORAL EXAMINATION
11) OF
12 R.J. REYNOLDS TOBACCO) KENNETH LUDMERER, M.D.
13 COMPANY, et al,)
14 Defendant.)
15 -----)

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1 KENNETH LUDMERER, M.D., Sworn.

2

3 EXAMINATION

4

5 BY MR. HOAG:

6 Q. Would you state your name for the
7 record?

8 A. Kenneth M. Ludmerer.

9 Q. You're a medical doctor, correct?

10 A. Yes.

11 Q. Have you ever been deposed before?

12 A. Yes.

13 Q. How many times about?

14 A. Three.

15 Q. And what was involved with those three
16 times?

17 A. Could you please clarify that
18 question?

19 Q. Yes. Of the three times when you were
20 deposed, were they all on legal cases, some kind
21 of litigation?

22 A. Yes, they were.

23 Q. I guess they had to be. What were the
24 cases?

1 A. The first case was for the retrial of
2 the Cipollone case. The second case was for the
3 State of Florida Attorney General case. I don't
4 remember if it was the State of Florida or the
5 state of Mississippi, one of the two. The third
6 time was for the State of Washington Attorney
7 General case in tobacco.

8 Now that we speak, I do remember a
9 fourth time I was deposed in relation to another
10 case.

11 Q. What case was that?

12 A. I could not tell you the name of it.

13 It was not related to tobacco. The University
14 of California San Francisco was a defendant in a
15 malpractice case. I was an expert witness for
16 the defense in this medical malpractice case. I
17 could not tell you the name of the case offhand.

18 Q. Now the first tobacco-related case
19 you mentioned was the Cipollone case. When were
you deposed in that case?

20 A. To the best of my recollection, late
21 March 1990.

22 Q. And the Florida Attorney General case?

23 A. To the best of my recollection, early

1 April 1997.

2 Q. And the State of Washington Attorney
3 General case?

4 A. June 3, 1998.

5 Q. Who took the deposition on June 3?

6 A. For the plaintiff?

7 Q. Yes.

8 A. I don't remember the man's name.

9 Q. How long did that deposition take?

10 A. Approximately three and one-half
11 hours.

12 Q. Who took the deposition in the Florida
13 Attorney General case, if you remember?

14 A. I do not remember the man's name.

15 Q. And the Cipollone you don't remember
the name either?

16 A. I do remember the name from Cipollone.

17 Q. What was that person's name?

18 A. Mark Edell.

19 Q. Did you know Mr. Edell before the
20 deposition?

21 A. No, I did not.

22 Q. Why does that one stand out in your
23 mind as opposed to the other two?

1 A. Longer deposition.
2 Q. How long was that one?
3 A. Two days verses the three-and-a-half
4 hours for Washington or the one-and-a-half hours
5 for the State of Florida.

6 Q. You testified about a wider variety of
7 things in the Cipollone case, or was it similar?

8 A. Same area. May I make a statement?

9 Q. Sure.

10 A. For the record, please have it
11 understood that I did not testify in the
12 Cipollone case. I gave a deposition for the
13 pretrial on the Cipollone case, which as I
14 understand it, was dropped or whatever. It
15 never occurred.

16 But I did not testify in the case. It
17 was a deposition for the retrial of the
18 Cipollone case.

19 Q. And that was in March of 1990?

20 A. To the best of my recollection.

21 Q. Okay. I've read the Disclosure
22 Statement related to your testimony. You read
23 your Disclosure Statement, right, the expert
24 witness disclosure?

1 A. Yes.

2 Q. On the third paragraph it says Dr.

3 Ludmerer -- how do you pronounce your last name?

4 A. Ludmerer.

5 Q. It says, "Dr. Ludmerer is expected to
6 testify about the state of medical knowledge of
7 smoking cigarettes, disease and a possible
8 relationship between cigarette smoke and disease
9 in the United States from the early 1900s to
10 1954."

11 A. It says that, correct?

12 A. Correct.

13 Q. And do you agree that's what you're
14 going to testify about?

15 A. In general, yes, though I do think it
16 would be more accurate to say that my testimony
17 begins in 1930.

18 Q. But the cut off here of 1964, your
19 testimony basically stops in 1964? You don't go
any further than that; is that correct?

20 A. That is correct.

21 Q. Why is it that it stops in 1964?

22 A. My work in this project goes through
23 the Surgeon General's report, which, as you

1 know, was January of 1964. That was a stopping
2 point because the Surgeon General's report led
3 directly to the Congressional legislation
4 requiring warnings on cigarette packages.

5 So, it seemed an appropriate landmark,
6 if you will, an appropriate stopping point. I
7 might also point out that in the Cipollone case,
8 the plaintiff had an expert witness dealing with
9 state-of-the-art who also elected to use January
10 1964 as a stopping point.

11 Q. So, as you sit here today in 1998,
12 does cigarette smoking -- in your opinion as a
13 medical doctor, does cigarette smoking cause
14 lung cancer?

15 MR. DODDS: I'll object only
16 because that is completely outside the scope of
17 his expected or disclosed testimony. We won't
18 be asking him about issues of causation from a
19 medical or scientific viewpoint. He's being
offered as a medical historian.

20 BY MR. HOAG:

21 Q. Sir, you can answer.

22 A. I do not have an expert opinion on
23 causation. That is not my area of expertise.

1 Q. Do you have an opinion on whether or
2 not it's been established that there's a link
3 between cigarette smoking and disease?

4 MR. DODDS: Same objection.

5 THE WITNESS: Could you

6 please repeat that question?

7 BY MR. HOAG:

8 Q. Do you have an opinion as to whether
9 or not there's a link between cigarette smoking
10 and disease?

11 A. I do not have an expert opinion on
12 that issue.

13 Q. Does that mean you don't know?

14 A. As an expert in causation?

15 Q. As a medical doctor, does that mean
16 you don't know whether or not there is a link
17 between cigarette smoking and disease?

18 MR. DODDS: Object to the
19 form.

20 THE WITNESS: Well,
21 certainly as a medical doctor, I am fully aware
22 of the claims regarding cigarette smoking and
23 its health hazards. I myself accept
24 epidemiological evidence as useful in joint

1 relationships of a causal nature. I personally
2 am willing to accept that cigarette smoking is a
3 major health hazard.

4 I would reiterate I'm not an expert in
5 this. I'm not a laboratory scientist or
6 epidemiologist. I have not investigated these
7 issues in a firsthand sort of way.

8 BY MR. HOA:

9 Q. You believe it's necessary to have
10 firsthand knowledge to have an expert opinion?

11 A. Could you please rephrase that
12 question? I don't understand the question that
13 you just asked me.

14 Q. When you said you don't have firsthand
15 knowledge, what do you mean by that, firsthand
16 knowledge?

17 A. I'm not a -- regarding causation?

18 Q. Yes.

19 A. I'm not a laboratory scientist nor am
20 I an epidemiologist. I have not been conducting
21 original investigations into any aspect of lung
22 cancer, particularly causation, or any aspect of
23 lung cancer.

24 I've not reviewed current literature

1 to be familiar with the current thinking about
2 causation in the same way I do my own research
3 areas.

4 I'm not an expert. I'm a physician.
5 I know what common teachings are. I'm not one
6 of those who has produced the teachings. I have
7 not reviewed original evidence on that subject,
8 and, hence, do not have an expert opinion on
9 that particular issue.

10 Q. Did you review the original evidence
11 on all those things prior to 1964?

12 A. I reviewed the world's published
13 literature on that subject.

14 Q. Prior to 1964?

15 A. Yes, beginning in 1930 through January
16 1964.

17 Q. But after 1964, you haven't done that
18 at all; is that correct?

19 A. That is correct.

20 Q. As a medical doctor in 1998, you don't
21 believe that you have enough personal knowledge
22 to render an opinion as to whether or not
23 cigarette smoking causes lung cancer?

24 MR. DODDS: Let me reiterate

1 my objection to this entire line of questioning
2 in the sense and because he's not being offered
3 as an expert in this field and the examination
4 of him on that subject is really entirely
5 outside anything that would be appropriate at
6 trial.

7 So such that, I think we're kind of
8 beating a dead horse here. But it's your
9 examination and you have the time available, but
10 I'd appreciate it if you'd ask him questions in
11 the area of expertise he's been designated in.

12 MR. HOAG: I'll ask him
13 whatever I think is appropriate. It's going to
14 be a waste of time to have you repeat it again,
15 because it's not going to change what I ask.

16 You can object.

17 BY MR. HOAG:

18 Q. If you could please answer the
19 question.

20 A. Your question misstates my position
21 and viewpoint. As I said before, as a
22 practicing physician, I accept the common
23 medical teachings. I teach this to my own
24 students. I advise my patients, friends and

1 family not to smoke.

2 I accept the common teachings as a
3 practicing physician. That is an opinion as a
4 medical physician and as a medical educator. It
5 is not an expert opinion on the issue of
6 causality from one whose research and
7 investigative career is devoted to investigating
8 causes of lung cancer or any other form of
9 cancer.

10 Q. Talking about the warning label on
11 cigarettes, it has changed over time. Are you
12 aware of how it's changed over time, the warning
13 label?

14 A. I do know that there have been certain
15 changes over time with changes becoming more
16 specific, more strongly worded, but that is the
17 extent of my knowledge.

18 Q. Now, one of the current warning label
19 says, "Warning: Cigarette smoking causes lung
20 cancer, heart disease and emphysema."

21 As a practicing physician, do you
22 agree with the current warning label, or do you
23 accept that as being accurate?

24 MR. DODDS: Same objection

1 as before. Plus it's been asked and answered.

2 BY MR. HOAG:

3 Q. You can answer.

4 A. As I have already said, I do accept
5 the common medical teachings. I do accept that
6 point of view in my own medical practice and in
7 my own medical teachings and in the advice that
8 I give patients, friends and family, as a
9 practicing physician, not as an investigator or
10 expert in the field of cancer or lung cancer.

11 Q. Did you accept that point of view
12 beginning in 1964 after the Surgeon General's
13 report was published?

14 A. Did I personally accept that in 1964?

15 Q. Yes. After the Surgeon General's
16 report was published.

17 A. Quite frankly, I don't think I gave
18 much attention to it in 1964. I was pretty
19 young at that time.

20 Q. Well, based on your research, you will
21 agree, won't you, that by 1964 there was a
22 consensus that cigarette smoking caused lung
23 cancer?

24 A. I would not agree with the statement

1 as you formulated it.

2 Q. At what point do you believe that
3 there was a consensus that cigarette smoking
4 causes lung cancer?

5 A. We're having a little -- at least I'm
6 having a little trouble with the audio. Could
7 you please ask that question again? I would
8 like to make certain I heard the question
9 correctly.

10 Q. At what point or what year do you
11 believe that there was a consensus in the
12 medical community that cigarette smoking causes
13 lung cancer?

14 A. It's my understanding that indeed,
15 following the Surgeon General's report of 1964,
16 a large majority consensus, if you will, of the
17 scientific community did accept the validity of
18 epidemiological evidence and, hence, the
19 relationship between smoking and lung cancer
particularly in males.

20 But it's also an important part of my
21 testimony that even at the time, there were
22 responsible scientists who disagreed with the
23 conclusions of the Surgeon General's report. If

1 they disagreed in 1963 or 1964, they're not
2 going to be persuaded by yet another report and
3 there was room for responsible, respectable
4 scientists to disagree, even though, clearly,
5 the public controversy died down.

6 Q. In your opinion, was there any point
7 from 1964 to the present were there was no
8 longer a legitimate controversy as to whether or
9 not cigarette smoking causes lung cancer?

10 MR. DODD: Objection to the
11 form.

12 THE WITNESS: Well, as you
13 know, I have not studied the controversy
14 forward, so I am unable to speak in a specific
15 or particular way to the controversy post-1964,
16 because I have not done the detailed, systematic
17 article by article analysis that I did for the
18 period 1930 to 1964.

19 So, my testimony is really not hoping
20 on 1964. On the other hand, I can also point
21 out that those who would disagree with
22 conclusions from the 1964 report might continue
23 to disagree with it going forward, that the
24 world view changed, but individuals who did not

1 accept the new world view may not have accepted
2 the conclusions of the Surgeon General's report.

3 So, there was room for responsible
4 scientists to disagree if you're looking for
5 experimental evidence of causality.

6 BY MR. HOAG:

7 Q. In your opinion, has the tobacco
8 industry ever agreed with the world's view on
9 causation as to cigarette smoking?

10 MR. DODDS: Again, I will
11 object. Outside the scope of his expertise and
12 assignment and Disclosure Statement.

13 THE WITNESS: I really have
14 no knowledge of the tobacco industry position on
15 different issues over time. I'm just not able
16 to comment on that.

17 BY MR. HOAG:

18 Q. Do you have any knowledge as to
19 scientific research the tobacco industry did
20 between the years 1930 to 1964?

21 A. What type of research?

22 Q. Scientific research the tobacco
23 industry did or funded itself internally from
24 1930 to 1964 related to the issue of smoking and

1 health.

2 MR. DODDS: Are we speaking
3 strictly of internal research, John?

4 MR. HOAG: Right now I am.

5 MR. DODDS: Okay.

6 THE WITNESS: I do not have
7 knowledge of internal company research.

8 BY MR. HOAG:

9 Q. Have you ever asked anyone to provide
10 that research to you so that you could review
11 it?

12 A. No, I haven't.

13 Q. Do you know whether or not there is
14 any such internal company research?

15 A. I don't have information to that
16 point.

17 Q. Do you know whether or not the
18 internal company research would have added to
19 the scientific knowledge that existed between
20 1930 and 1960 concerning the link between
21 cigarette smoking and disease?

22 MR. DODDS: I'll object.

23 You can answer. It's a hypothetical without
24 foundation, but if you can answer it, go ahead.

1 THE WITNESS: As I said
2 before, I do not have specific information at
3 all regarding what research, if any, tobacco
4 companies were conducting internally on this
5 issue.

6 I can also say in this hypothetical,
7 knowing that the world's greatest medical
8 establishment, the United States, was making
9 this, particularly after 1950, such an important
10 cause in its activities, that the intellectual
11 powers of the National Institute of Health, the
12 medical institutes, the pharmaceutical
13 companies, et cetera, were being brought to bear
14 on this issue.

15 and find it highly unlikely to imagine
16 that tobacco company internal research would
17 have advanced the state of knowledge beyond what
18 the biomedical establishment was doing in its
19 own vigorous efforts.

BY MR. HOAG:

21 Q. Do you know how many scientists the
22 tobacco industry had working on this issue
23 between 1930 and 1964?

24 A. No, I do not.

1 Q. Do you know how much money the tobacco
2 industry spent researching the issue between
3 1930 and 1964?

4 A. No.

5 Q. Do you know how much money the tobacco
6 companies make in profit each year?

7 A. No.

8 Q. Do you know whether or not the issue
9 of whether or not tobacco smoking causes a
10 health problem is an important issue to the
11 tobacco industry?

12 A. At what point in time?

13 Q. Between 1930 and 1964, at any time in
14 those decades.

15 MR. DODDS: I'll object. No
16 foundation.

17 BY MR. HOAG:

18 Q. You can answer.

19 A. I'm aware after 1950 that the tobacco
20 industry was concerned with the issue of smoking
21 and its medical effects. To my knowledge, I'm
22 unaware of any activity of the tobacco industry
23 before 1950, before that point.

24 On the other hand, there were very few

1 medical scientists anywhere that were concerned
2 about that issue during the period that I've
3 examined the interest of the tobacco industry,
4 and the issues parallel that of the biomedical
5 investigators.

6 Q. Let me make sure I understand. You
7 have not reviewed even one single piece of
8 internal research the tobacco industry did at
9 any time; is that correct?

10 A. That is correct. As I mentioned
11 before, my research has been in the published
12 scientific literature in the biological and
13 medical journals.

14 Q. It's your opinion that no matter how
15 much money was spent or no matter how many
16 scientists the tobacco industry had that was
17 doing research related to the health effects of
18 tobacco smoke, you do not believe it's even
19 possible that even one of those scientists could
20 have come up with any information that would
21 have been even slightly likely to advance
22 medical science on that issue; is that correct?

23 MR. DODDS: I'll object to
24 the form.

1 THE WITNESS: Your
2 statement, as you phrased it, does not
3 accurately represent my views on that.

4 BY MR. HOAG:

5 Q. So, then you do believe that it's
6 possible that scientists who were funded by the
7 tobacco industry who did internal research could
8 have done research that would have been valuable
9 had it been disclosed to the medical community
10 and public correct?

11 MR. DODDS: Objection to the
12 form. It calls for speculation, no foundation,
13 not relevant.

BY MR. HOAG.

13) Q. Is that correct?

16 A. Could you please repeat that
17 question?

18 MR. HOAG: Could the court
19 reporter read it back, please?

(The record was read by the reporter as requested.)

22 THE WITNESS: Anything is
23 possible. Number one, as I said before, I have
24 not investigated internal research of any sort

1 done by the tobacco companies. And I made
2 additional point that the powerful medical
3 establishment of the western world was working
4 on this issue, and this was an establishment
5 that was focused on biomedical research in a way
6 that no one else could do.

7 BY MR. HOAG:

8 Q. Do you have any intention of reviewing
9 the internal research of the tobacco industry
10 during the period of time from 1930 to 1964?

11 A. At this moment in time, I do not.

12 Q. Had you ever read the Cigarette
13 Papers?

14 A. No. I have not.

15 Q. Have you reviewed any of the Brown and
16 Williamson documents, which are available on the
17 Internet?

18 A. No.

19 Q. Have you reviewed any of the documents
20 from the Minnesota Attorney General case on the
21 Internet?

22 A. No.

23 Q. Have you reviewed any of the documents
24 available on the Internet from Philip Morris

1 that's in place there as a result of the
2 Minnesota litigation?

3 A. No.

4 Q. Did you know there were tens of
5 thousands of documents placed by each major
6 tobacco company on the Internet within the past
7 few months as a result of an agreement reached
8 in the Minnesota Attorney General litigation?

9 A. I'm aware that there is a large number
10 of documents on the Internet. I do not know
11 precisely the sequence of events that led to
12 their being on the Internet.

13 Q. And you have no interest whatsoever in
14 reviewing any of the scientific studies that are
15 available to you that were done by the tobacco
16 industry during the time that you are listed as
17 an expert about the research that's been done on
18 smoking and health; is that correct?

19 MR. DODDS: Objection.

20 THE WITNESS: Could you
21 re-ask the question, again?

22 MR. HOAG: Could you read it
23 back for me?

24 (The record was read by the

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1 reporter as requested.)

2 MR. DODDS: Also I object to
3 lack of foundation.

4 THE WITNESS: In response to
5 your question, I would say that, as I said
6 before, at this time I have no intention of
7 reviewing internal company documents. My
8 assignment was a different assignment, to
9 examine the state of medical knowledge through
10 the published biomedical literature.

11 That is the assignment that I did. It
12 was not necessary or pertinent to review
13 internal company documents at that time, and at
14 this time I have no intention of reviewing
15 company documents in the future.

16 BY MR. HOAG:

17 Q. Are you aware that in the 1950s the
18 tobacco industry hired researchers and paid them
19 to do research that was published which
20 questioned the link between cigarette smoking
21 and health?

22 MR. DODDS: Objection. Lack
23 of foundation.

24 THE WITNESS: I am aware in

1 the 1950s that the tobacco industry began
2 funding research relating to the health effects
3 of cigarettes. That is why I answered earlier
4 that after 1950 the tobacco industry was clearly
5 showing an interest in this issue.

6 To my knowledge, the tobacco industry
7 supported the research itself. These were
8 highly ethical and professional investigators
9 whose research was sometimes funded by tobacco
10 funds. But it was the researchers themselves
11 and the studies and their work that was being
12 funded.

13 I'm unaware of any evidence that the
14 tobacco industry in any way influenced their
15 opinions.

16 BY MR. HOAG:

17 Q. Well, the reason you're unaware of
18 that is because you haven't made any systematic
19 review of the documents that are in existence;
20 isn't that correct?

21 A. That is incorrect.

22 Q. Well, you have not made any systematic
23 review of the internal tobacco documents that
24 are in existence; is that correct?

1 A. As I said before, I have not reviewed
2 systematically. In fact, I have not reviewed at
3 all internal company documents. On the other
4 hand, I have reviewed the scientific literature
5 on this subject, and I do know that many of the
6 studies that were funded by tobacco money came
7 up with conclusions that were injurious to the
8 tobacco industry.

9 In addition, I know that many of the
10 investigators who received tobacco money were
11 also funded for the same studies by other
12 agencies such as the National Institutes of
13 Health or American Cancer Society, and these
14 were very ethical, prominent, respectable
15 individuals.

16 So, I am unaware of any evidence that
17 anyone's views on either side of the controversy
18 were influenced by tobacco money.

19 Q. Do you know whether or not the
20 researchers who were funded by the tobacco
21 industry in the 1950s were required to place
22 some kind of a disclaimer on their public
23 research saying they were funded at least in
24 part by the tobacco industry?

1 A. I am not certain I understand that
2 question. Could you please ask again?

3 MR. HOAG: Could the court
4 reporter read back the question, please?

5 (The record was read by the
6 reporter as requested.)

7 MR. DODDS: I'll object to
8 the form [REDACTED] that question.

9 THE WITNESS: I do know that
10 there were many published papers from this era,
11 and I'm defining this era of 1950s and early
12 1960s that acknowledged funding in part from the
13 tobacco industry in the paper itself.

14 I also am aware that this was common
15 practice in the scientific community for an
16 investigator to acknowledge funding support from
17 any agency. I also am aware that many
18 individual papers that acknowledged support from
19 the tobacco industry received support from the
20 National Institutes of Health or American Heart
21 Association or the American Cancer Society or
22 other similar groups for the same project.

23 I do not know specifically what terms,
24 if any, there were for investigators receiving

1 tobacco industry funds for their research in
2 terms of disclaimers.

3 BY MR. HOAG:

4 Q. You don't know whether or not there
5 have ever been occasions where individuals who
6 were funded by the tobacco industry did not
7 disclose in the published research that they
8 received funds from the tobacco industry,
9 correct? [REDACTED]

10 A. Did not disclose?

11 Q. Did not disclose.

12 A. That's correct. I don't have
13 information either way on that. I do know that
14 a number of studies at this time that came up
15 with conclusions that were contrary to the
16 tobacco hypothesis were funded in part by
17 tobacco company money.

18 I also know a number of studies came
19 out with conclusions that supported the
20 cigarette hypothesis were funded at least in
21 part by tobacco company research funds because
22 this was stated on the papers.

23 I have no information at all at this
24 time that would be pertinent to the issue of

1 whether an investigator did not reveal funding
2 sources from the tobacco industry or from any
3 other funding organization for that matter.

4 Q. That would require you to review
5 tobacco industry internal documents, and you
6 haven't done that, right?

7 A. To answer that question --

8 Q. [REDACTED] person me?

9 A. [REDACTED] To answer that question, you mean it
10 would be required to review?

11 Q. Right. In order to know how often
12 that was done, that they did not disclose, you'd
13 have to review internal company documents, and
14 you haven't done that, right?

15 A. Reviewing internal company documents
16 may provide information like that. It may not.
17 Sometimes results in historical research, like
18 any other research, that's not the only way to
19 get to that question.

20 If a historian wanted information on
21 that point, another way to go about seeking that
22 information might be to review the papers of the
23 scientists themselves, and I'm speaking in a
24 hypothetical, but it is possible that

1 information on that point might be in the papers
2 or correspondence or records of individual
3 scientists rather than in the company records.

4 In either case, I have not reviewed
5 these types of personal records, either of the
6 scientists themselves or of the company.

7 Q. Are you aware of whether or not the
8 tobacco industry in the 1950s funded contract
9 research that was under the control of the
10 tobacco industry attorneys?

11 A. I have no information on that point.

12 Q. Do you know whether or not the tobacco
13 industry ever funded contracts and research
14 approved by attorneys that was published in the
15 public domain?

16 A. As I've said a number of times already
17 in this deposition, I've not reviewed internal
18 company documents. I don't have any information
19 on the operations of the company and how
20 projects were selected and who did the selection
21 and what requirements they were and what papers
22 were signed and what i's were dotted and t's
23 were crossed.

24 I don't have any information on this

1 point, and it was not pertinent to the project
2 that I did investigate; that is, the published
3 scientific literature and state of knowledge.

4 Q. You will admit, at least since 1964,
5 the tobacco industry has funded research and had
6 a public relations effort to create a false
7 impression that there actually is a controversy
8 as to whether or not cigarette smoking causes
9 any disease. correct?

10 MR. DODDS: Objection to
11 form. Outside the scope of his testimony and
12 expertise.

13 THE WITNESS: That is
14 incorrect. I have no information at all on
15 that. I haven't investigated it. I am unable
16 to answer that question on the basis of just not
17 having looked into it and just not knowing.

18 BY MR. HOAG:

19 Q. Have you ever read the Frank Statement
20 of the tobacco industry?

21 A. Yes.

22 If I may also interject, we've been
23 sitting here for a little over an hour. I
24 wouldn't mind taking a quick stretch. Perhaps

1 after this question we could do so, but I would
2 appreciate the opportunity to stretch for a
3 couple of minutes.

4 Q. Right now is fine.

5 A. Let's do it now.

6 (A short recess was taken.)

7 BY MR. HOAG:

8 Q. My last question was as to the Frank
9 Statement and you said you were familiar with
10 it. When did you become aware of it?

11 A. I don't remember precisely. It would
12 have been sometime when I began this project.

13 Q. What project are you referring to?

14 A. My systematic study of the state of
15 the scientific understanding of the causes of
16 lung cancer and the health hazards of cigarettes
17 from 1930 to 1964.

18 Q. Approximately when did you begin that
19 project?

20 A. September 1988.

21 Q. And how did you come to begin that
22 project?

23 A. I was contacted by attorneys from
24 Arnold and Porter, if I recall.

1 Q. Did they represent any tobacco company
2 or companies?

3 A. They did. I cannot --

4 Q. What company or companies did they
5 represent?

6 A. I couldn't tell you for sure. I
7 believe it was Philip Morris, but I'm not
8 positive.

9 Q. Who contacted you, if you can recall?

10 A. Murray Garnick.

11 Q. Murray Garnick?

12 A. Correct.

13 Q. Is that an attorney?

14 A. Yes, it is.

15 Q. Did you know that person prior to the
16 time he contacted you?

17 A. No.

18 Q. Have you come to find out at any point
19 how it is you came to be contacted by Murray
Garnick?

20 A. I can relate to you what he told me.

21 Q. I have no firsthand knowledge. I do know and
22 remember what he told me.

23 Q. What did he tell you?

1 MR. DODDS: I'll object.

2 THE WITNESS: Concerning how
3 he contacted me?

4 BY MR. HOAG:

5 Q. Yes.

6 A. He called me in August 1988 to tell me
7 that his firm represented one or several or all
8 of the tobacco companies. I quite honestly
9 could not tell you who Arnold and Porter was
10 representing at that time.

11 He said that they were interested in
12 having as a consultant an individual with
13 impeccable credentials both in the history of
14 medicine and in medicine to conduct a study for
15 them dealing with the knowledge of cigarette
16 smoking and its health hazards and the causes of
17 lung cancer.

18 He informed me that he called the
19 secretary-treasurer of the American Association
20 for the History of Medicine to seek
21 recommendations of an individual with both the
22 historical and medical credentials that they
23 were seeking, and that this officer of the
24 Association gave him my name, and that's how he

1 came to call me.

2 Q. Do you know whether he gave him other
3 names or just yours?

4 A. I have no information on that.

5 Q. After you were approached about doing
6 this, what did you say?

7 A. I'm sorry. What did?

8 Q. What did you say and/or do?

9 A. What did I say?

10 Q. Yes.

11 A. Well, first I wanted to know a bit
12 about the nature of the project that he had in
13 mind, and I asked him about that.

14 Q. Was the nature of project explained to
15 you?

16 A. Yes, it was.

17 Q. And you were satisfied?

18 A. I'm not sure I understand you
19 regarding satisfied.

20 Q. Was there anything about the nature of
21 the project that troubled you in any way?

22 A. No.

23 Q. Did he or any other attorney provide
24 you with access to all of the tobacco industry

1 internal documents at any point?

2 A. If we could backtrack, the nature of
3 the project was to investigate the state of
4 knowledge through the published medical and
5 scientific literature. Internal company
6 documents had no bearing on that question.

7 He did not offer internal company
8 documents. I did not ask and I did not see the
9 need for internal company documents. What I did
10 ask for, or perhaps what I did say, stipulate,
11 as a requirement was that in conducting this
12 research, that I would approach it with the same
13 thoroughness, comprehensiveness, integrity, et
14 cetera, that I do in all my scholarly work, and
15 this was to be an independent project, that I
16 would determine how the study should be
17 conducted, that I would assume complete and
18 total responsibility for the study, for the
19 results.

20 He said that that was not only
21 agreeable to him, but precisely what he wanted.

22 And then I said, "Fine. I would be happy to
23 undertake this for you."

24 Q. Now, do you think you'd be sitting

1 here today doing this deposition if your
2 conclusion would have been that the consensus
3 was established in 1963 that cigarette smoking
4 caused disease?

5 MR. DODDS: I'll object.

6 Calls for speculation, irrelevant,
7 argumentative, a waste of time.

8 BY MR. HOAG:

9 Q. I'm asking if that was your
10 conclusion, what do you think?

11 A. I have no idea.

12 Q. How much are you paid per hour to do
13 this research?

14 MR. DODDS: I'm going to
15 permit him to testify about his compensation in
16 connection with this case and object under
17 Florida rules as to compensation in connection
18 with other cases.

19 You can ask him about the total number
20 of hours he spent over the years, the proportion
21 of work he's done for plaintiffs versus
22 defendants, but not compensation related to all
23 work at all times.

24 BY MR. HOAG:

1 Q. How much did you charge per hour to do
2 this research?

3 MR. DODDS: Same objection.

4 You're asking him a question not permitted under
5 Florida rules.

6 MR. HOAG: Are you
7 instructing him not to answer?

8 MR. DODDS: I'm not going to
9 instruct him not to answer, but if I have to
10 make a motion and argue this to the Judge at a
11 later time to strike his testimony, I will seek
12 costs.

13 BY MR. HOAG:

14 Q. How much did you make per hour to do
15 this research?

16 A. Are you referring to the project that
17 resulted from my conversation with Murray
18 Garnick that led to my current views?

19 Q. Yes.

20 A. My fee was \$200 per hour.

21 Q. Have your fees changed at all through
22 expert research or work?

23 A. Yes.

24 Q. What are your fees now?

1 A. 1998 they are \$300 per hour compared
2 with the \$200 per hour that I was charging in
3 1988 when Mr. Garnick contacted me.

4 Q. Now, that research you did, that's the
5 basis for your opinions today, isn't it?

6 A. Correct.

7 Q. If you hadn't done that research, you
8 wouldn't have a basis to be sitting here today
9 doing this deposition, correct?

10 A. That is very correct.

11 Q. So, how many hours have you spent
12 doing this research to prepare yourself to do
13 this and other depositions?

14 MR. DODDS: I'm going to
15 object again on the basis that you're permitted
16 to ask about, according to the Florida rules,
17 the scope of employment and the pending case and
18 the compensation for such service, his general
19 litigation experience including the percentage
20 of work performed for plaintiffs and defendants,
21 the identity of other cases which the expert has
22 testified by deposition or trial, approximation
23 of the portion of the expert's involvement as an
24 expert witness, which may be based on the number

1 of hours, percentage of hours percentage of
2 earned income derived from serving as an expert
3 witness.

4 However, the expert shall not be
5 required to disclose his or her earnings as an
6 expert witness or income derived from other
7 services.

8 MR. HOAG: Okay. I've
9 already made my record that this is all he did,
10 had he not done the research. So, it's directly
11 related, and you can argue it to the Judge. Are
12 you instructing him not to answer?

13 MR. DODDS: I'm not
14 instructing him not to answer any questions as
15 of this time. I'm just reading the rules, and
16 we have made our record. And if you persist in
17 asking questions not permitted by the Rules of
18 Civil Procedure in the State of Florida, we will
19 make our motion at the appropriate time.

MR. HOAG: Okay. I don't
agree with your interpretation of the rules.

22 BY MR. HOAG:

23 Q. So, how many total hours have you
24 spent working on this research that allows you

1 to voice an expert opinion?

2 A. That project, which, as I mentioned to
3 you, was conducted in 1988 and 1989, took
4 approximately 1,000 hours.

5 Q. And the testimony that you've provided
6 in all three of the tobacco-related cases, that
7 testimony has been based on that research; is
8 that correct?

9 A. That is correct.

10 Q. And I said three. It's actually four
11 counting the Engle case, correct?

12 A. Correct. Engle would make four.

13 Q. Now, other than the 1,000 hours you
14 spent doing this study, how many additional
15 hours, if any, have you spent in doing
16 additional preparation for your testimony in
17 Engle?

18 A. It's a bit difficult for me to know
19 precisely what the number of those hours have
20 been, because there have been a number of delays
21 in the case since I was initially contacted. I
22 would say a couple of hundred hours to review
23 materials for this case done in staccato
24 fashion, if you will. I've had to redo some of

1 my work.

2 Originally I was expecting to testify
3 in the Engle trial last fall, so I did some
4 preparation at that time for that. As you know,
5 that was postponed. I was then advised that I
6 would be deposed for the Engle case in the
7 second half of January or February, so I
8 reviewed for that. That got delayed until
9 today, and I've had to review again for today's
10 deposition.

11 In the order of a couple of hundred
12 hours throughout all of that.

13 Q. What did you have to review to prepare
14 for the Engle case?

15 A. I needed to refresh my memory and
16 subjects that I investigated eight, nine, 10
17 years ago. I reread some important articles. I
18 read -- you'll have to excuse me -- what do you
19 call the statement that puts an expert's views?

20 You have it in front of you, a Disclosure
21 Statement. I studied the Disclosure Statement,
22 articles that were pertinent to the opinions in
23 the Disclosure Statement.

24 I reviewed my testimony from previous

1 depositions and my one trial appearance both to
2 refresh myself with the subject matter and as
3 well as to make certain that I could be as
4 consistent as humanly possible so that my
5 testimony for this case would be as accurate as
6 humanly possible. Things of this sort.

7 Q. What was the trial that you testified
8 in?

9 A. The Cutler trial in Boston.

10 Q. What was that case about?

11 A. I can only say of it, it was a case
12 filed on behalf of an individual smoker, and I
13 did appear as a witness in that case. That was
14 my first and only trial appearance.

15 Q. What year was that?

16 A. 1991, to the best of my recollection.

17 To the best of my recollection, it was February
18 1991.

19 Q. What was the allegation made by the
plaintiff in that case?

20 A. I don't have any idea.

21 Q. But during that trial, your testimony
22 focused on your research of the published public
23 domain articles related to smoking and health

1 between 1930 and 1964; is that correct?

2 A. That is correct. My testimony for the
3 one trial appearance and now my fourth
4 deposition on tobacco has all pertained to the
5 same specific area, the state of knowledge in
6 the medical and scientific community from the
7 published literature from the period 1930 to
8 1964.

9 Each of these have dealt with that
10 specific area and each of these arose from my
11 original investigation done at investigation or
12 after speaking with Murray Garnick in August
13 1988.

14 Q. Now, were any of the documents that
15 you reviewed in what you term systematic
16 analysis, were any of those documents provided
17 to you by the representatives of the tobacco
18 industry including attorneys?

19 A. Not to my recollection. As I said
20 before, one of the ground rules that I laid out
21 at the beginning was that this would be my
22 research, and I was the one to decide what
23 needed to be examined or what didn't need to be
24 examined, how to go about doing it.

1 The articles that were investigated at
2 that time were all articles that I thought were
3 important to look at.

4 Q. Did you prepare any written report
5 about your analysis?

6 A. No.

7 Q. So, even up to this date, you haven't
8 prepared ~~any~~ written report concerning your
9 analysis; is that correct?

10 A. That is correct.

11 Q. Do you have any plans to publish your
12 analysis?

13 A. No. May I make an amendment or an
14 addition to my answer?

15 Q. Yes.

16 A. This deals with your question about
17 articles being supplied.

18 Q. Yes.

19 A. When I did the research, I generated
20 my own bibliography, and it's my understanding
21 that those have been sent to you. The project

22 involved a review of the world's literature.

23 Almost the entire literature at that time was in
24 English, but there were occasional articles that

1 were published in French or other languages, and
2 Mr. Garnick had access to a translation
3 service.

4 So, on those instances where articles
5 by their titles seemed important to me to read
6 from Spain or France or wherever they might be,
7 I would periodically give Mr. Garnick a list of
8 those articles and request that they be
9 translated into English.

10 So in that sense, he sent me the
11 English translations of articles I had
12 requested.

13 Q. A hypothetical question. If you had
14 been asked to compare the published scientific
15 information on smoking and health to the
16 unpublished internal scientific research of the
17 tobacco industry from 1930 to 1964, would you
18 have done that?

19 Would you have been willing to do
20 that?

21 A. Would I have been willing to compare
22 it?

23 Q. Yes.

24 A. I possibly would have depending on

1 time. It was a very large job to do the
2 published literature. It took a personal toll
3 to be able to do the project from the published
4 literature in a thorough and comprehensive way
5 without sacrificing my ongoing professional and
6 personal responsibilities.

7 To take on a huge internal literature
8 would have been quite a large project. I don't
9 know if I would have had the time. I don't know
10 if I would have been able to do that or not. I
11 was willing to take on a project at that time.

12 I don't know if I would have been able
13 to take on two projects, especially since
14 looking at internal documents of such a large
15 industry can be such an extensive and time
16 consuming process.

17 So, I don't know if I would have or
18 not.

19 Q. It would have taken you longer to
20 review the internal documents than to review all
21 the other documents; is that correct?

22 A. I don't know. I don't know how much,
23 if any, work there was of a scientific sort on
24 this subject internally. There are quite a few

1 internal documents. It's not clear to me if
2 your question is referring to all internal
3 company documents or an internal company
4 document of a particular issue.

5 Certainly, to look at all company
6 documents would be an even more monmouth
7 undertaking. I don't know how extensive the
8 documents are in terms of company sponsored
9 research.

10 But even if that is relatively modest
11 in size, it would have been another project.
12 Taking on the first project was time consuming
13 enough, and I had limited time and other
14 personal, professional responsibilities.

15 Q. Do you know whether or not any tobacco
16 industry scientists asked for permission to
17 publish scientific papers and have been denied
18 permission by the tobacco industry employer?

19 A. I have no information to that
20 question.

21 Q. Does it make any difference to you?
22 MR. DODDS: Object to the
23 form.

24 THE WITNESS: I'm not

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1 certain that I understand the question that
2 you're asking.

3 BY MR. HOAG:

4 Q. Well, does it make any difference to
5 you as far as your systematic analysis of the
6 published research from 1930 to 1964 is
7 concerned?

8 In other words, if there were a number
9 of tobacco industry scientists who wanted to
10 publish original research and were denied the
11 opportunity to publish it, could it have viewed
12 the results of your study of your systematic
13 analysis?

14 MR. DODDS: I'm going to
15 object to that, (a) on the basis that it's
16 speculative, hypothetical. Secondly as to form,
17 and third no foundation.

18 BY MR. HOAG:

19 Q. You can answer it.

20 A. First of all, as you stated, this is a
21 hypothetical. Secondly, the second part of my
22 answer is: As I've said before, I have no
23 information at all concerning company behavior,
24 company policies, et cetera.

1 And thirdly, since my assignment dealt
2 with the published scientific literature, by
3 definition, something that was unpublished,
4 whether the work of -- in the hypothetical
5 scenario, whether the work of a scientist with
6 the tobacco company or equally an investigator
7 at a medical school, who, for whatever reason,
8 chose not to publish results -- and there are
9 many legitimate reasons that scientists don't
10 publish results.

11 In either case, it would not have
12 affected my project because I was dealing with
13 the published scientific literature.

14 Q. Now, back to the Frank Statement.

15 You've read the Frank Statement during the
16 course of your assignment with the tobacco
17 industry, correct?

18 A. I have seen the Frank Statement. I
19 don't have a copy in front of me as we speak. I
20 have seen the Frank Statement.

21 Q. What do you know about the Frank
22 Statement?

23 A. To answer your question accurately,
24 could you please be a little bit more specific?

1 Q. Are you familiar with the contents of
2 the Frank Statement?

3 A. I have read the Frank Statement. I'm
4 acquainted with the contents. As I said, I
5 don't have a copy of it in front of me. I have
6 read the Frank Statement.

7 Q. Now, in that statement, the tobacco
8 industry [REDACTED] the health of the American public
9 was of paramount importance to them, correct?

10 A. MR. DODDS: I'm going to
11 object to you asking him taking out specific
12 little portions, which may or may not be
13 accurate, either in terms of your quoting them
14 or the context in which you're taking them. I
15 think it's only fair to the witness to put the
16 document in front of him.

17 BY MR. HOAG:

18 Q. Is that correct?

19 A. The statement that you read?

20 Q. The question that I asked you.

21 A. Could you please re-ask the question?

22 MR. HOAG: Could you read
23 the question for me?

24 (The record was read by the

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1 reporter as requested.)

2 THE WITNESS: My
3 recollection is that the statement contained
4 words to that effect. Without the statement in
5 front of me, I don't know that those were
6 precisely the words, but it sounds familiar. As
7 I've said already, I don't have the statement in
8 front of me, but it sounds familiar.

9 [REDACTED] Are you reading from the statement?
10 Would that be the term that you represent that
11 this is in the statement?

12 BY MR. HOAG:

13 Q. Well, all I can represent to you is
14 that's my question about the Frank Statement.
15 If your recollection is different about what it
16 says, your recollection is different.

17 A. [REDACTED] Are you reading?

18 MR. DODDS: Wait for the
19 question.

20 THE WITNESS: Are you
21 reading?

22 MR. DODDS: There's no
23 question pending.

24 BY MR. HOAG:

1 Q. Do you know in how many states the
2 Frank Statement was published in?

3 A. No.

4 Q. Do you know why the tobacco industry
5 decided to publish the Frank Statement?

6 MR. DODDS: Objection. No

7 foundation.

8 BY MR. HOAG:

9 Q. I'm asking your opinion why. That's
10 all my question is. Do you know why the tobacco
11 industry decided to publish the Frank Statement?

12 MR. DODDS: Same objection.

13 BY MR. HOAG:

14 Q. Do you know?

15 A. My knowledge of that is through the
16 tobacco companies' own explanations in the Frank
17 Statement. I have no further information on
18 that beyond what the tobacco company says in the
19 Frank Statement.

Q. Have you ever heard of the Tobacco
Institute?

22 A. Yes.

23 Q. What is the Tobacco Institute, if you
24 know?

1 A. I don't have a great deal of knowledge
2 or understanding of it. I'm interpreting
3 Tobacco Institute to TIRC, Tobacco Institute and
4 Research Counsel.

5 Is that the same organization? If
6 it's not the same organization, then I'm not
7 certain. I can only say there are some
8 industry-wide organizations.

9 That's the extent of my knowledge. I
10 couldn't tell you who belonged and what their
11 specific purposes were.

12 Q. What you refer to as TIRC, the Tobacco
13 Industry Research --

14 A. I've seen reference to TIRC.

15 Q. Do you know whether or not they funded
16 any research?

17 A. I don't know precisely who or how
18 within the tobacco industry research was
19 funded. I do know that some medical research,
20 all of it reputable that I have seen, was funded
21 in part with the assistance of tobacco funds.

22 I don't know if this came from
23 individual companies or an industry-wide
24 organization that was funded by each of the

1 companies. If there was an industry-wide
2 foundation, I don't know its precise name.

3 I just know that the tobacco industry
4 did fund a considerable amount of what we would
5 call external research, outside the company,
6 providing research grants to investigators in
7 different disciplines at a host of medical
8 schools and research institutes and so forth.

9 Q. Have you ever heard of special
10 projects funded by the tobacco industry?

11 A.

12 Q. Have you ever heard of the Council for
13 Tobacco Research?

14 A. That is a name that I have heard. I
15 could not tell you the difference in purpose or
16 organization or funding between that and the
17 Tobacco Institute. My knowledge essentially is
18 I've heard the name.

19 Q. Have you ever reviewed or read any
20 tobacco industry press releases?

21 A. Outside of the Frank Statement, which
22 I believe you said was from the Tobacco
23 Institute, are you referring to things beyond
24 the Frank Statement?

1 Q. Yes.

2 A. Beyond the Frank Statement, no, I have
3 not. The only Institute or industry-wide
4 release that I have seen is the Frank Statement,
5 or at least I should say, that I recall having
6 seen as we talk today.

7 Q. Part of your Disclosure Statement,
8 your expert witness Disclosure Statement, says
9 that you might be asked to comment on the
10 opinions and basis that was expressed by
11 plaintiffs' witnesses related to the evolution
12 of medical knowledge of smoking and health.
13 Q. Are you familiar with any of the
14 opinions of plaintiffs' witnesses in Engle?

15 A. No at this time.

16 Q. Have you reviewed any of the opinions
17 of plaintiff's witnesses in Engle?

18 A. No. I have not. I don't know even know
19 the identity of the plaintiffs' witnesses at
20 this time.

21 Q. That was my next question.

22 Let's take a five-minute break. I'll
23 probably be finished. I may be finished now. I
24 may have a couple more questions.

1 A. Okay.

2 (A short recess was taken.)

3 MR. HOAG: Okay. I don't
4 have any other questions.

5 MR. DODDS: John, I have one

6 or two.

7 BY MR. DODDS:

8 Q. [REDACTED] Ludmerer, at that time that Mr.
9 Hoag asked you about the opinions that you might
10 express concerning testimony by any other
11 witnesses in this case, did you know that Dr.

12 Elizabeth Whelan was an expert in this case?

13 A. [REDACTED] No, I did not.

14 Q. [REDACTED] Have you reviewed or seen any opinions
15 by Dr. Whelan in this case?

16 A. [REDACTED] In this case?

17 Q. [REDACTED] Yes.

18 A. [REDACTED] No.

19 Q. [REDACTED] Have you seen or reviewed any opinions
20 expressed by Dr. Whelan in other cases?

21 A. [REDACTED] Yes, I have.

22 Q. [REDACTED] If Dr. Whelan expressed the same views
23 in this case as she has in other cases, would
24 you have views to share regarding those

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1 opinions?

2 A. Yes.

3 Q. And your testimony on such occasion

4. would be similar to what you would expect to

5 give regarding her testimony in those other

6 cases?

A. Yes.

MR. DODDS: That's all I

have

BY MR. HORN.

Q What is your opinion concerning Dr.

Elizabeth Whalen's statement that you're

Familiar Paths

MR. DODDS: I'll object to

the form of that question, but you can answer

THE WITNESS: I have seen an

expert report that she did for the Tompkins

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BY MR. WONG

2. Which case? The answer

And what is that sweet moment did you

22. names on diagnoses with?

MR. BOBBUS: Objection to the

1 form. You can answer.

2 THE WITNESS: I don't
3 remember precisely. It's been a while ago since
4 I saw that report. I do not have that report in
5 front of me now. I do remember that the report
6 was more far-ranging in scope than my
7 testimony.

8 [REDACTED] testimony, as you know, deals with
9 the state of knowledge in the scientific and
10 medical communities from 1930 to January of
11 1964, and that's it. I do remember that her
12 report covered other topics that I have not been
13 at all involved with.

14 But insofar as she did have
15 interpretations of events in that report
16 pre-1964, I did not think that her
17 interpretation was accurate.

18 BY MR. HOAG

19 Q. What specific event did she discuss
20 and interpret that you disagreed with?

21 A. Again, I am speaking from
22 recollection, not having reviewed that recently
23 and not having it in front of me now, but I do
24 remember that the general thrust of her report

1 was that the knowledge that cigarette smoking
2 causes lung cancer was -- that knowledge in the
3 scientific community and consensus in the
4 scientific community that smoking caused lung
5 cancer existed much earlier than it, in fact,
6 did exist.

7 My Disclosure Statement, as you know,
8 indicates [REDACTED] it's my view that the controversy
9 over this issue continued through January of
10 1964. Her report indicated that things were
11 pretty wrapped up significantly before then, and
12 I disagree with that view.

13 [REDACTED] My comments about her report, I do
14 want the record to understand and reflect, the
15 recollection of her report that is not in front
16 of me now. So, I don't want to mischaracterize
17 it in any way. But to the best of my
18 recollection, that's, I think, the most accurate
19 answer that I can give you at this time.

20 Q. Well, aside from the fact that Dr.
21 Whelan disagrees with your opinions that it was
22 not a controversy up until 1964, that general
23 opinion, are there any specific details that you
24 disagree with that Elizabeth Whelan stated in

1 her report that you're familiar with?

2 A. Well, I would say again that I
3 strongly disagree with her interpretation of
4 events, but without the report in front of me,
5 I'm not able to specifically look at point by
6 point types of items.

7 Q. Can you provide one example of an
8 event or interpretation you disagree with where
9 you disagree with Elizabeth Whelan's
10 interpretation?

11 A. Yes, I can.

12 Q. What is that?

13 A. She, at least in that report, presents
14 a one-sided view of events, picking and choosing
15 articles selectively that support a preformed
16 opinion. But having studied the period article
17 by article over a 34 year period, looking at the
18 totality of the world's literature, I was
19 impressed by the absence of many important
20 articles and studies and investigators from her
21 report when those articles contain contrary
22 views to her interpretation.

23 Q. What researchers did Elizabeth Whelan
24 leave out that you consider to be important?

1 A. I would have to see the report. Right
2 now I don't have it in front of me. It's not
3 been recently that I have read it, and I believe
4 that it's very important that my answers to you
5 be accurate.

6 I would really need to see the
7 document to answer that question.

8 MR. HOAG: I know we
9 requested any information that he relied on or
10 planned to testify about. This is a document
11 that is not in our litigation that may base an
12 opinion on a witness in our litigation that I
13 don't have in front of me, that I've never been
14 provided.

15 to the extent that he's unable to
16 answer questions about this, I move to strike
17 his testimony about Elizabeth Whelan during the
18 trial. So I guess this is something we're
19 going to have to deal with at that time.

20 MR. DODDS: I point out that
21 this was a report that I had not seen, was not
22 provided to us prior to Dr. Whelan's testimony
23 in this case. It was withheld from us and was
24 not provided by us to Dr. Ludmerer, and it seems

1 that if there's going to be any preclusion, it
2 would be of the testimony of Dr. Whelan on the
3 basis of failure to disclose important and
4 material aspects of her testimony.

5
6 MR. HOAG: He somehow
7 reviewed it in some other litigation. I guess
8 we'll just have to deal with this later.

9 MR. DODDS: Well, he is here
10 now. If you want to ask him questions about
11 what he recalls, that's fine. If you want to
12 lay in front of him any document or other piece
13 of her testimony in this case, this is the time
14 to do it. And if you don't take the
15 opportunity, you will not be heard later to
16 complain that you couldn't.

17 MR. HOAG: Well, he hasn't
18 read anything from Elizabeth Whelan in this
19 case. Therefore, there's nothing showing that
20 he could present an opinion on Elizabeth Whelan
21 if he hasn't read it. But you certainly had
22 every opportunity to show it to him prior to the
23 deposition.

24 So, again my statement holds. So I,
guess we're at an impasse here. So, there's

1 nothing more he can recollect.

2 MR. DODDS: All I can say is
3 if you want to fax anything from her, he will be
4 very happy to comment on it.

5 MR. HOAG: That would have
6 been your responsibility to provide to him a
7 long time ago. He's at deposition, and you
8 could have provided to him prior to this
9 deposition. So, as far as I'm concerned, he
10 already answered questions about what he knows
11 and what he intends to testify.

12 If at some future point you want to
13 show him information, depositions from other
14 witnesses, then you need to let us know and
15 address that issue at a future time.

16 That's my opinion. I understand you
17 have a different one.

18 MR. DODDS: We can agree to
19 disagree.

20 MR. HOAG: Okay. That's
21 what we're doing. So, I'm assuming we are
22 concluded. Thank you very much for your time.

23 (The deposition was
24 concluded at 3:30 p.m.)

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1 **C E R T I F I C A T I O N**

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3

I, MAUREEN WALKER,

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Professional Court Reporter and Notary

5

Public, do hereby certify that the

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foregoing is a true and accurate

7

transcript of the stenographic notes

8

taken by me in the aforementioned

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matter on Tuesday, June 9, 1998.

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DATED:

6/16/98 *Maureen Walker*

MAUREEN WALKER

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CERTIFICATION

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3 I, KENNETH LUDMERER, M.D.,

4 having read the foregoing, find it to be a true

5 and accurate transcript of the testimony given

6 by me on June 9, 1998, in the aforementioned

7 matter, with the following additions, deletions,

8 or corrections. I understand that I may make no

9 additions, deletions, or corrections as an

10 afterthought upon my reading of this

11 transcript.

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13 PAGE LINE CORRECTION

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DATED: _____

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KENNETH LUDMERER, M.D.

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